

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEABURY & SMITH, INC.,
a Delaware corporation,

Plaintiff,

vs.

PAYNE FINANCIAL GROUP, INC.,
a Montana corporation, EDWARD
EUGENIO, and D. GERARD BULGER,
Defendants.

NO. CV-03-481-JLQ

MEMORANDUM OPINION AND
ORDER **GRANTING IN PART AND
DENYING IN PART** PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

BEFORE THE COURT is Plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 30). Plaintiff is represented by **Leslie R. Weatherhead** and **Kimberly A. Kamel**. Defendants are represented by **James B. King** and **Christopher Kerley**. Plaintiff Seabury & Smith ("Seabury") alleges that Defendants Edward Eugenio and Gerard Bulger left their employment with Seabury, commenced employment with Payne Financial Group ("Payne") and thereafter solicited and serviced former Seabury clients in violation of their restrictive covenant agreement with Seabury. Seabury alleges that Payne engaged in a "team effort" with Eugenio and Bulger to tortiously interfere with the business relationship of 25 long-time Seabury clients. Seabury seeks summary judgment as to liability on two of the five claims in its Second Amended Complaint (Ct. Rec. 25). Seabury seeks a ruling that Defendants Eugenio and Bulger breached their covenants not to compete and that all Defendants tortiously interfered with business expectancy.

Defendants counter that the covenant is ambiguous. Defendants claim they were aware of the covenant and attempted to abide by it, but that it was ambiguous in its

1 failure to define key terms and overbroad to the extent it prohibited social contacts.

2 BACKGROUND

3 As Plaintiff is the party moving for summary judgment, the evidence and
4 inferences therefrom are viewed in the light most favorable to Defendants. The facts
5 are undisputed except where otherwise stated.

6 Seabury is part of Marsh & McClellan Companies and provides insurance,
7 investment, and consulting services in Spokane, Washington. Seabury requires its
8 employees to sign a restrictive covenant agreement which provides that they will not
9 solicit or service Seabury customers for a period of time after leaving Seabury. (Pltf St
10 of Fact ¶ 14). William Wrigglesworth worked for Seabury for 25 years (when Seabury
11 was formerly known as Sedgwick James) and after the name changed to Seabury. (Id. at
12 ¶ 18 & 19). While at Seabury, Mr. Wrigglesworth was a manager and had oversight
13 over Gerard Bulger, Scott McGann, and Edward Eugenio. (Id. at ¶ 21). Mr.
14 Wrigglesworth left Seabury in July 2000 and as part of his severance package signed a
15 two-year non-compete agreement which extended through June 30, 2002.

16 Mr. Wrigglesworth moved to Montana and went to work for Terry Payne &
17 Company. (Deft. St. Fact ¶ 221). Terry Payne & Company became Payne Financial
18 Group in January 2001 and Mr. Wrigglesworth became President and CEO. (Id. at ¶
19 220-221). Mr. Wrigglesworth moved back to Spokane in the summer of 2002 to open a
20 Spokane office for Payne Financial Group. (Id. at ¶ 228).

21 Defendant Bulger had worked in the insurance industry for 15 years when he left
22 Seabury on August 15, 2003, and commenced employment with Payne. (Deft. St. Fact ¶
23 1 & 2). Mr. Bulger signed a non-compete agreement while at Seabury. (Id. at ¶ 6). The
24 applicable term of the restrictive covenant agreement was August 31, 2003 through
25 August 30, 2004. (Pltf. St. of Fact ¶ 94). As an employee of Payne, Mr. Bulger dropped
26 off policies to Bonner General (formerly a client of Seabury and former account of
27 Bulger's). (Deft. St. of Fact ¶ 17). Mr. Bulger attended a meeting with Spokane Mental
28 Health (a former Seabury client) at which Spokane Mental Health signed a broker of

1 record letter with Payne. (Id. at ¶ 25-26). Mr. Bulger similarly attended meetings with
2 several other former Seabury clients including: ALSC Architects, Fruci & Associates,
3 and National General Supply.

4 Mr. Scott McGann began working for Seabury in 1993, when it was Sedgwick
5 James. (Deft. St. Fact ¶ 147). While McGann is not a Defendant, his actions as an agent
6 of Payne are relevant as to the claims against Payne. He left Seabury during the
7 summer of 2002. (Id. at ¶ 148). While at Seabury, McGann signed the same restrictive
8 covenant agreement as Defendants Bulger and Eugenio. The agreement was in effect
9 for 12 months after he left Seabury. (Pltf's Ex. 1). McGann accepted a position with
10 Payne in September, 2002. (Pltf. St. Fact ¶ 38). McGann does admit that some of his
11 former clients at Seabury switched their business to Payne during the period of his non-
12 compete. (Deft. St. Fact ¶ 154). McGann attended a meeting with former client
13 Metriguard during the period of his non-compete agreement. (Id. at ¶ 155). McGann
14 also attended a meeting with former client Tri-State Distributors. (Id. at ¶ 158).
15 McGann arranged an inspection of former client YMCA's premises and accompanied an
16 insurance carrier representative on the inspection. (Id. at ¶ 183). McGann admits
17 talking to a current Seabury employee, Brady Cass, about leaving Seabury and informed
18 Cass that he could talk to Mr. Wigglesworth if he was interested in Payne. (Id. at ¶
19 196). This was allegedly in violation of McGann's restrictive covenant agreement.

20 Defendant Eugenio began working for Sedgwick James in 1997. Eugenio
21 resigned from Seabury on November 27, 2002 and accepted a position at Payne. (Pltf's
22 St. Fact ¶ 76). While at Seabury, Eugenio signed a restrictive covenant agreement.
23 (Pltf's Ex. 1). The covenant was effective for one-year after his resignation from
24 Seabury, from November 27, 2002 to November 26, 2003. (Pltf St. of Fact ¶ 77).
25 Eugenio admits visiting a former-Seabury client, American Van Service, during the
26 period of the non-competition agreement. (Deft. St. Fact ¶ 111). Eugenio also admits
27 talking to three Seabury employees--Beth Scott, Jeff Hanson, and Paul Belles about job
28 opportunities and differences between working at Seabury and Payne. (Id. at ¶ 134-

1 136). Eugenio additionally states that he handled personal lines coverage for some
2 former clients; filed broker of record letters for two former Seabury clients whom Mr.
3 Neupert, a vice-president at Seabury, had allegedly told him he could take; and may
4 have dropped off a policy to a former client. (see Eugenio declaration, Ct. Rec. 49).

5 SUMMARY JUDGMENT STANDARD

6 The purpose of summary judgment is to avoid unnecessary trials when there is no
7 dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S.*
8 *Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled
9 to summary judgment when, viewing the evidence and the inferences arising therefrom
10 in the light most favorable to the nonmoving party, there are no genuine issues of
11 material fact in dispute. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
12 242, 252 (1986). While the moving party does not have to disprove matters on which
13 the opponent will bear the burden of proof at trial, they nonetheless bear the burden of
14 producing evidence that negates an essential element of the opposing party's claim and
15 the ultimate burden of persuading the court that no genuine issue of material fact exists.
16 *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir.
17 2000).

18 Once the moving party has carried its burden, the opponent must do more than
19 simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec.*
20 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1975). Rather, the opposing party
21 must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

22 DISCUSSION

23 I. Breach of Restrictive Covenant Claims

24 Scott McGann, Edward Eugenio, and Gerard Bulger all signed agreements with
25 Seabury that included a covenant not to compete or interfere. Specifically, the
26 agreements provided:

27 "COVENANTS NOT TO COMPETE OR INTERFERE. While employed by
28 Seabury & Smith, and for a period ending twelve (12) months from and after the

1 termination of such employment, Employee will not, directly or indirectly, as a sole
2 proprietor, member of a partnership or stockholder, investor, officer or director of a
3 corporation, or an employee, agent, associate or consultant of any person, firm or
4 corporation, other than for the exclusive benefit of Seabury & Smith:

5 (a) solicit or accept business of the type offered by Seabury & Smith during the
6 term of Employee's employment by Seabury & Smith from, or perform or supervise the
7 performance of any services related to such business for:

8 (i) any clients or prospects of Seabury & Smith or its affiliates who were
9 solicited or serviced, directly or indirectly, by Employee, or by those

10 supervised, directly or indirectly, by Employee in whole or in part; or

11 (ii) any former client of Seabury & Smith or its affiliates who was such
12 within two years prior to termination of Employee's employment with
13 Seabury & Smith and who was solicited or serviced, directly or indirectly,
14 by Employee, or by those supervised, directly or indirectly, by Employee
15 in whole or in part; or

16 (b) directly or indirectly solicit or assist others in soliciting any employee of
17 Seabury & Smith or its affiliates to terminate his or her employment with Seabury &
18 Smith."

19 The agreement further provided restrictions on the disclosure of confidential
20 information:

21 "DISCLOSURE OF INFORMATION: Employee recognizes and acknowledges
22 that Seabury & Smith's trade secrets and confidential or proprietary information (such
23 as but not limited to information relating to Seabury & Smith's operations, services,
24 service providers, products, computer codes, clients, prospects, etc.), including such
25 trade secrets or information as may exist from time to time, are valuable, special and
26 unique assets of Seabury & Smith's business and access to and knowledge of which are
27 essential to the performance of Employee's obligations to Seabury & Smith. Employee
28 will not, during or after the term of employment by Seabury & Smith, in whole or in

1 part, disclose such secrets or confidential or proprietary information to any person, firm,
2 corporation, association or other entity for any reason or purpose whatsoever, nor
3 during such period shall Employee make use of any such property for Employee's own
4 purposes or for the benefit of any person, firm, corporation or other entity (except
5 Seabury & Smith) under any circumstances, except that after such term of employment
6 these restrictions shall not apply to such secrets or information which are then in the
7 public domain, provided that Employee was not responsible, directly or indirectly, for
8 such secrets or information entering the public domain without Seabury & Smith's
9 consent."

10 Generally, restrictive covenants in employment contracts are enforceable so long
11 as the restrictions therein are "not greater than are reasonably necessary to protect the
12 business or good will of the employer, even though they restrain the employee of his
13 liberty to engage in a certain occupation or business, and deprive the public of the
14 services, or restrain trade." *Alexander & Alexander v. Wohlman*, 19 Wash.App. 670,
15 686 (1978)(citing *Racine v. Bender*, 141 Wash. 606 (1927)). In examining
16 reasonableness, the court will look to the extent of the restriction, the length of time the
17 restriction is in effect, and the geographic area covered. The reasonableness of the
18 covenant is a conclusion of law. *Alexander* at 684. The court in *Racine* employed a
19 three-part test to determine if: 1) the restraint is necessary for the protection of the
20 business or good will of the employer; 2) the restraint on the employee is greater than is
21 reasonably necessary; and 3) the degree of injury to the public from the loss of the
22 service and skill of the employee is great enough to warrant nonenforcement of the
23 covenant. *Id.* at 686.

24 Defendants' primary challenge to the restrictive covenant in the agreements they
25 signed, is not that the agreements were unreasonable in geographic area or term, but that
26 the covenants contained ambiguous terms and Plaintiff's broad construction of the
27 terms, if accepted, would make the covenants unreasonable. Defendants complain that
28 the terms "directly or indirectly" and "solicit" and "service" are ambiguous. Words

1 used in a contract must be given their plain and ordinary meaning, unless the contract
2 states otherwise. A contract should be read as an average person would read it and the
3 terms should be given a practical and reasonable interpretation. *Eurick v. Pemco Ins.*
4 *Co.*, 108 Wash.2d 338 (1987). "If only one reasonable meaning can be ascribed to the
5 agreement when viewed in context, that meaning necessarily reflects the parties' intent."
6 *Martinez v. Miller Indus.*, 94 Wash.App. 935 (1999). Whether a contract is ambiguous
7 is a question of law. *R.A. Hanson, Co. v. Aetna Ins. Co.*, 26 Wash.App.290 (1980). A
8 contract term is ambiguous if uncertain or when capable of two or more reasonable and
9 fair interpretations. *Allstate Ins. Co. v. Hammonds*, 72 Wash.App. 664 (1994). Only
10 when there is a bona fide ambiguity may extrinsic evidence be presented to the trier of
11 fact for interpretation.

12 Defendants argued at oral argument that this court could not determine the
13 reasonableness, enforceability, and ambiguity of the restrictive covenants. As the cases
14 cited *supra* demonstrate, the rules of law are to the contrary. See also *Pacific Aerospace*
15 *& Electronics, Inc. v. Taylor*, 295 F.Supp.2d 1205 (E.D. Wash. 2003)(finding as a
16 matter of law that the non-solicitation provision of the restrictive covenant was
17 reasonable and not an undue restraint of trade). The terms "solicit", "service" and
18 "direct or indirect" are not ambiguous. It is well-settled law in the state of Washington
19 that a restrictive covenant may prohibit the performance or providing of services and
20 solicitation.

21 In *Racine v. Bender*, 141 Wash. 606 (1927), almost eighty years ago the
22 Washington Supreme Court upheld a covenant which stated that an employee, after
23 leaving employment, shall not "solicit" or "perform any accounting or auditing work".
24 The Washington Supreme Court construed this covenant as being written "in words that
25 no man may misunderstand". *Id.* at 609. In *Perry v. Moran*, 109 Wash.2d 691 (1987),
26 the Washington Supreme Court again upheld a restrictive covenant which stated that the
27 employee shall not "provide services". The court specifically rejected an argument that
28 the employer could adequately protect its client base by merely prohibiting the former

1 employee from soliciting or diverting clients. The court found that such a prohibition
2 would not be an adequate safeguard, stating: "It is reasonable for the employer to
3 preclude the employee from servicing those who were clients of the employer during
4 the period of employment and for a period after the cessation of employment." *Id.* at
5 701. This court rejects the Defendants' argument that the words "directly or indirectly"
6 rendered the covenant ambiguous. These words have a commonsense and ordinarily
7 applied meaning. See *Pacific Aerospace & Electronics, Inc. v. Taylor*, cited *supra*
8 (upholding a covenant as reasonable and enforceable, as a matter of law, that prohibited
9 direct or indirect solicitation).

10 The court finds as a matter of law that the covenant is not ambiguous. The court
11 further finds that the covenant is reasonable and enforceable as a matter of law. The
12 covenant is limited in duration to the relatively short time period of one-year.
13 Washington courts have routinely upheld similar covenants longer in duration. See
14 *Racine v. Bender*, 141 Wash. 606, 615 (1927)(upholding a 3-year restriction on
15 soliciting or performing services for former clients and noting that "the limitation, it
16 will be seen, is far less restrictive than many upheld by the courts"). The covenant is
17 also reasonably limited in scope to Plaintiff's clients and prospective clients who were
18 solicited or serviced during employee's term of service with Plaintiff.

19 This court additionally finds that disputed factual issues remain as to whether
20 Defendants Eugenio and Bulger breached their restrictive covenants. Eugenio and
21 Bulger have both filed affidavits claiming that they did not solicit or service former
22 Seabury clients during the period of non-compete restrictions. Seabury claims that
23 Defendants Eugenio and Bulger breached the covenant and correspondingly tortiously
24 interfered with upwards of 25 Seabury clients.

25 Defendants do admit to attending meetings with former clients (but not actively
26 participating), to performing errands such as dropping off a policy, and to receiving (but
27 then redirecting) an occasional call from a former client. However, Defendants dispute
28 that any of these activities constitute the servicing or solicitation prohibited by the

1 covenant. Defendant Bulger does admit accepting the business of former clients
2 Athletic Foundation and LLC & M during the period of his non-competition agreement.
3 The trier of fact could find this to be in violation of the covenant and could find breach
4 as to these two clients. However, Bulger also asserts that the transfer of this account
5 was negotiated with Seabury, was not immediately rewritten upon transfer, and that
6 Payne offered to provide Seabury with commission for the renewal. Seabury contends
7 that Defendants' actions in accepting this account violated the terms of the covenant.
8 Numerous factual issues remain to be submitted to the trier of fact as to the majority of
9 the former Seabury clients. The court declines to find, as a matter of law, that
10 Defendants have breached the covenant.

11 **II. Tortious Interference with Business Expectancy**

12 Under Washington law, there are five elements to the tort of interference with a
13 business expectancy. A plaintiff must establish: 1) the existence of a valid contractual
14 relationship or business expectancy; 2) that the defendant(s) had knowledge of the
15 expectancy; 3) an intentional interference inducing or causing a breach or termination
16 of the relationship or expectancy; 4) that the defendant interfered for an improper
17 purpose or used improper means; and 5) resulting damage. *Newton Ins. Agency v.*
18 *Caledonian Ins. Group*, 114 Wash.App. 151, 157-58 (2002)(citing *Leingang v. Pierce*
19 *County Med. Burequ*, 131 Wash.2d 133 (1997)).

20 As to the first element, a valid business expectancy "includes any prospective
21 contractual or business relationship that would be of pecuniary value". *Newton Ins.* at
22 158. It is undisputed that Seabury had clients, had on-going contracts with those
23 clients, and that many of the 25 clients which were allegedly interfered with had been
24 clients of Seabury for several years. The first element is established.

25 As to the second element, Defendants Eugenio and Bulger undisputedly had
26 knowledge of Seabury's clients and business expectancy. Payne additionally had
27 knowledge of the covenants not to compete relevant to Eugenio, Bulger, and McGann.
28 Interference with a business expectancy is intentional if "the actor desires to bring about

1 or if he knows that the interference is certain or substantially certain to occur as a result
2 of his action." *Id.* at 158. In *Newton*, all that was required to establish this element was
3 that the former employees [Eugenio & Bulger] and new employer [Payne] intended that
4 the former employer's [Seabury's] customers would switch from [Seabury] to [Payne].
5 It is undisputed that Payne desired to, and in fact did, obtain former Seabury customers.
6 Thus the first three elements are established.

7 Payne disputes that it interfered for an improper purpose or improper means and
8 it disputes that Seabury can prove the causal connection to damages. Payne argues that
9 Seabury cannot establish that its clients would not have left absent any 'interference'
10 from Payne. Seabury argues that the employees' breach of their restrictive covenants
11 and Payne's capitalization of such breach establishes the fourth prong of interference by
12 improper means. Payne argues that it engaged in legitimate competition for clients and
13 that Seabury has the burden of proving Payne acted in bad faith or dishonestly. These
14 are disputes of fact as to the fourth and fifth elements.

15 The *Newton Ins.* court held that the fourth element is established, as a matter of
16 law, when interference with a business expectancy is in violation of a contract not to
17 compete. Plaintiff cannot establish its right to summary judgment on the tortious
18 interference claim without first establishing that Defendants breached the restrictive
19 covenants. Therefore, Plaintiff's motion for summary judgment on the tortious
20 interference claim is denied.

21 **IT IS HEREBY ORDERED:**

22 1. Plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 30) is **GRANTED**
23 **in part and DENIED in part as set forth herein.** The court holds as a matter of law
24 that the non-compete covenants at issue are reasonable, enforceable, and unambiguous.
25 The court finds that genuine issues of material fact remain as to whether Defendants
26 breached their respective covenants.

27 The court additionally holds, as a matter of law, that Plaintiff has established the
28 first three elements of tortious interference. However, as the court has not found breach

1 of the covenant as a matter of law, the court cannot find that Defendants tortiously
2 interfered as a matter of law.

3 2. Defendants' numerous motions to strike the Plaintiff's affidavits and briefing
4 in support of Plaintiff's motion for partial summary judgment are hereby **DENIED**. (Ct.
5 Rec. 46, 48, 72, & 74).

6 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
7 furnish copies to counsel.

8 **DATED** this ____ day of July, 2005.

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10 _____
11 JUSTIN L. QUACKENBUSH
12 SENIOR UNITED STATES DISTRICT JUDGE
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